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CASE NO.

in the
Supreme Court
of the
United States

OCTOBER TERM 1983

JOSE MEDARDO ALVERO CRUZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE ELEVENTH CIRCUIT'S NEW DEFINITION OF ACCRUAL OF TAX LIABILITY WHICH IMPOSES ADDITIONAL REQUIREMENTS BEYOND THE RECOGNIZED PRINCIPLES OF ACCRUAL ACCOUNTING CONFLICTS WITH PRONOUNCEMENTS OF THIS COURT AND OTHER FEDERAL COURTS, AND REDEFINES THE CONCEPT OF ACCRUAL FOR INCOME TAX AND OTHER PURPOSES IN A MANNER HAVING IMPLICATIONS FAR BEYOND THIS CASE?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioner, his family, the United States of America, and the Tax Section of The Florida Bar.

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Petitioner, JOSE MEDARDO ALVERO CRUZ, respectfully prays that a writ of certiorari issue to review the judgment, opinion, and order on rehearing of the United States Court of Appeals for the Eleventh Circuit entered on February 22, 1983, and April 15, 1983.

OPINIONS BELOW

The opinion of a divided panel of the Court of Appeals for the Eleventh Circuit is reported as *United States v. Cruz*, 698 F.2d 1148 (11th Cir. 1983). A copy of the majority decision and lengthy dissent is reproduced in the Appendix to this petition. A suggestion for rehearing en banc and petition for panel rehearing was denied on April 15, 1983. That order is also included in the Appendix. The appellate court entered a stay of mandate in this case pending the timely filing and disposition of a petition for writ of certiorari.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment from which review is sought was rendered February 22, 1983. An order denying rehearing was entered April 15, 1983. On June 10, 1983, Justice Lewis F. Powell entered an order extending the time within which to file a petition for writ of certiorari to and including July 15, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property without due process of law. . .

26 U.S.C. §901:

> Taxes of foreign countries and of possessions of United States.

(a) **Allowance of credit.**—If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall, subject to the limitation of section 904, be credited with the amounts provided in the applicable paragraph of subsection (b) . . . Such choice for any taxable year may be made or changed at any time before the expiration of the period prescribed for making a claim for credit or refund of the tax imposed by this chapter for such taxable year. . . .

(b) **Amount allowed.**—Subject to the limitation of section 904, the following amounts shall be allowed as the credit under subsection (a):

* * * *

(3) **Alien resident of the United States or Puerto Rico.**—In the case of an alien resident of the United States and in the case of an alien individual who is a bona fide resident of Puerto Rico during the entire taxable year, the amount of any such taxes paid or accrued during the taxable year to any foreign country; . . .

26 U.S.C. §905:

Applicable Rules.

(a) **Year in which credit taken.**—The credits provided in this subpart may, at the option of the taxpayer and irrespective of the method of accounting employed in keeping his books,

be taken in the year in which the taxes of the foreign country or the possession of the United States accrued, subject, however, to the conditions prescribed in subsection (c). If the taxpayer elects to take such credits in the year in which the taxes of the foreign country or the possession of the United States accrued, the credits for all subsequent years shall be taken on the same basis, and no portion of any such taxes shall be allowed as a deduction in the same or any succeeding year. . . .

26 U.S.C. §7201:

Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. §7206:

Fraud and false statements.

Any person who—

(1) **Declaration under penalties of perjury.**—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it

is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

* * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

Course of Proceedings

ALVERO CRUZ[1] was charged with four counts of attempting to evade payment of income taxes for the 1975 through 1978 taxable years in violation of 26 U.S.C. §7201. The jury found him guilty on all four counts. He received a prison sentence of four years on the first count, followed by consecutive terms of two years on each of the other three counts, for a total sentence of ten years.

ALVERO CRUZ appealed to the Eleventh Circuit. He challenged the trial court's jury instruction regarding the accrual of foreign tax liability, contending that the instruction was contrary to well-established principles of accrual accounting as laid down by the Supreme Court and the lower federal courts. A divided panel of the Eleventh Circuit affirmed ALVERO CRUZ's convictions and sentences. The majority opinion concluded that the instruction, despite its announcement of a new definition of accrual for tax purposes, was correct. The

[1]Petitioner is referred to as ALVERO CRUZ throughout this proceeding, although the opinion below refers to him only by his mother's maiden name of CRUZ.

lengthy dissent asserted that the majority incorrectly defined "accrual" contrary to Supreme Court precedent and confused that term with the very different concepts of assessment and levy.

Statement of Necessary Facts

During the income tax evasion trial, the government sought to prove the existence of tax fraud through use of the "net worth method." As his defense, ALVERO CRUZ claimed that he owed no taxes because he was entitled to a foreign tax credit pursuant to 26 U.S.C. §901 for taxes which had "accrued" to the Dominican Republic. A taxpayer such as ALVERO CRUZ is entitled to a credit against his United States tax for foreign taxes "paid or accrued." 26 U.S.C. §901(b)(3). The taxpayer can claim a credit for "accrued" foreign taxes even though he is on a cash basis. 26 U.S.C. §905(a). If ALVERO CRUZ were given the tax credit for accrued foreign taxes, the tax deficiency—an essential element of the offenses charged—is eliminated.

To support his entitlement to a foreign tax credit for "accrued" foreign taxes, ALVERO CRUZ proved: (1) that he was a resident and citizen of the Dominican Republic; (2) that the Dominican Republic imposed taxes on the worldwide income of its citizens; (3) that he had a substantial tax liability to the Dominican Republic which accrued under Dominican law during each of the tax years in issue; (4) that the Dominican statute of limitations had not expired for the collection of the taxes; and (5) that his Dominican tax liability for those years was final. The government neither challenged this evidence nor produced any contrary proof.

ALVERO CRUZ claimed that his legal defense was unaffected by the fact that he did not timely report

the income in question to the United States or the Dominican Republic, because he was entitled to a credit for *accrued* Dominican Republic taxes, and under both nations' laws those taxes *accrued* at the close of each of the tax years, regardless of when the tax was reported. The Dominican Republic tax liability entitled ALVERO CRUZ to a credit against his United States taxes, resulting in no United States tax due and owing.

At the close of the trial, the district court outlined ALVERO CRUZ's defense for the jury. It instructed the jury that ALVERO CRUZ would not be guilty if there was no tax deficiency because of a foreign tax credit. The court further told the jury that ALVERO CRUZ would be entitled to a foreign tax credit for taxes "accrued" to a foreign government. It then defined the conditions necessary for such a tax to accrue:

> For a foreign tax credit to accrue under United States tax laws you must find that with regard to the foreign tax all events have occurred which fix the amount of the tax and determine the liability of the taxpayer to pay it. That is, you must find that the foreign government is aware of the income that is taxable in their country; that the foreign government has computed the tax due on that income, and that the Defendant has acquiesced to or failed to contest that amount of tax due to the foreign government.

ALVERO CRUZ did not object to the first sentence of this charge. It properly defined "accrual" in accordance with controlling decisions of this Court. But he strenuously objected to the court's qualification of that definition contained in the second sentence. Each of the conditions

imposed by the instruction was erroneous and emasculated ALVERO CRUZ's defense: (1) a tax liability accrues whether or not the taxing authority is aware that a tax is due; (2) a tax liability accrues whether or not the taxing authority has computed the tax due; (3) a tax liability accrues whether or not the taxpayer has acquiesced in the amount of tax due. The district court's instruction therefore contravened the basic concept of "accrual". Absent a proper instruction, the jury was denied an opportunity to consider ALVERO CRUZ's defense.

REASONS FOR GRANTING THE WRIT

WELL-ESTABLISHED PRINCIPLES OF ACCRUAL ACCOUNTING AS LAID DOWN BY THIS COURT SET OUT A STRICT DEFINITION OF "ACCRUAL" FOR TAX PURPOSES. THE ELEVENTH CIRCUIT'S IMPOSITION OF ADDITIONAL REQUIREMENTS TO THIS DEFINITION FRUSTRATES UNIFORMITY IN THE TAX LAWS AND HAS IMPLICATIONS FAR BEYOND THE RESULT REACHED IN THIS CASE.

This case raises an issue of statutory construction in a tax case. It concerns the right of a taxpayer to claim accrual of a tax credit when the historically recognized prerequisites to that accrual have been met. It further concerns the ability of a court to impose additional requirements on the definition of accrual and in so doing rewrite legislation, regulations and the well-established principles of accrual accounting in a manner which not only causes an incorrect result in this case but also frustrates uniformity in tax matters. The impact of the decision by the appellate court

transcends the boundaries of this case and will greatly affect matters of tax liability in civil, criminal, and administrative litigation. Because of the conflicting precedent created by this decision and the upheavals in tax law which accompany this radical change, review by this Court is necessary and appropriate.

ALVERO CRUZ was charged with income tax evasion. He contended at trial that he owed no taxes because he was entitled to a tax credit for foreign taxes which had "accrued".[2] The trial court instructed the jury:

> For a foreign tax credit to accrue under United States tax law, you must find with regard to the foreign tax all events have occurred which fix the amount of the tax and determine the liability of the taxpayer to pay it.

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[2]The panel opinion summarized the applicable tax law at 1151:

> Section 33(a) provides: "The amount of taxes imposed by foreign countries and possessions of the United States shall be allowed as a credit against the tax imposed by this chapter to the extent provided in section 901." Section 901(b)(3) provides: "In the case of an alien resident of the United States and in the case of an alien individual who is a bona fide resident of Puerto Rico during the entire taxable year, the amount of any such taxes paid or accrued during the taxable year to any foreign country . . .".
>
> Section 905(a) provides when a foreign tax credit may be taken and allows the taxpayer the option of electing between the cash or accrual method of reporting. *See United States v. Campbell*, 351 F.2d 336, 338 (2d Cir. 1965); 2 R. von T. Rhoades & M. J. Langer, Income

This definition was consonant with established principles of accrual accounting and was correct. However, the court proceeded to qualify and limit this definition:

> That is, you must find that the foreign government is aware of the income that is taxable in their country; that the foreign government has computed the tax due on that income, and that the defendant has acquiesced to or failed to contest that amount of tax due to the foreign government.

This instruction was erroneous. A tax liability accrues whether or not the taxing authority is aware that a tax is due. A tax liability accrues whether or not the taxing authority has computed the tax due. A tax liability accrues whether or not the taxpayer has acquiesced in the amount of the tax due. Nevertheless, a majority of the panel concluded that the instruction was proper. They held as a matter of substantive tax law that a tax liability does not accrue until the taxing authority computes the tax due and the taxpayer acquiesces in that computation. Thus, the majority confused the term "accrual" with the equally important, but wholly different term "assessment". That conclusion is contrary to fundamental principles of tax law as set forth by this Court and represents a substantial judicial revision of the tax code.

(Footnote 2 Continued)

Taxation of Foreign Related Transactions, §5.03(4)(a). Cruz, a cash basis taxpayer, elected to accrue his foreign tax credit. The right to take the foreign tax credit is open for ten years. 26 U.S.C. §6511(d)(3); *Hart v. United States*, 585 F.2d 1025 (Ct.Cl. 1978) (en banc).

This Court has recognized that the definition of accrual has been reaffirmed so often that "it is now a fundamental principle of tax accounting." *United States v. Consol. Edison Co.*, 366 U.S. 380, 385, 81 S.Ct. 1326, 1330 (1961). The 2-1 opinion of the Eleventh Circuit radically changed that definition and altered the certainty on which our tax system depends. Such a change in fundamental tax principles has drastic implications far beyond this case.

The concept of accrual has been previously well defined and is based on historical precedent:

> Ever since the Supreme Court rendered its opinion in *United States v. Anderson*, 269 U.S. 422, 46 S.Ct. 131, 70 L.Ed. 347 (1926), it has been the rule that accrual taxpayers . . . may deduct an expense in the taxable year in which *"all the events" have occurred which determine the fact of liability and which fix with reasonable certainty the amount of such liability* [emphasis added]. . . .
>
> The "all events" test has been applied many times by various courts since the decision in *Anderson* was handed down. [12 citations omitted].

Putoma Corp. v. Comm'r, 601 F.2d 734, 738 (5th Cir. 1979); *Gillis v. United States*, 402 F.2d 501, 506 (5th Cir. 1968). The government's regulations contained in Treas. Reg. 1.461-1(a)(2) include the same definition:

> Under an accrual method of accounting, an expense is deductible for the taxable year in which all the events have occurred which

> determine the fact of the liability and the amount thereof *can be determined* with reasonable accuracy [emphasis added].

The Eleventh Circuit correctly recognized the propriety of this definition by stating:

> The Supreme Court established the general rule relating to the accrual of income, deductions, or credits, for income purposes in *United States v. Anderson*, 269 U.S. 422, 46 S.Ct. 131, 70 L.Ed. 347 (1926); and *Dixie Pine Products Co. v. Commissioner of Internal Revenue*, 320 U.S. 516, 64 S.Ct. 364, 88 L.Ed. 270 (1944). That rule provides that a tax is deemed to accrue when all events have occurred which fix the amount of the taxpayer's income, deductions, or credit, and determines the liability of the taxpayer for tax, *although there has not yet been an assessment or maturity.* (citations omitted). The accrual of the foreign tax credit is essentially governed by this rule.

698 F.2d at 1151. Thus, the Eleventh Circuit recognized as have all courts which have directly examined this issue, that a tax accrues when its amount is determinable and that accrual is not dependent on assessment, a result fully consistent with *Anderson, Dixie Pine* and other authorities. In the very next sentence, however, the panel emasculated this rule and created a new one to replace it:

> In the case of the foreign tax credit, the final event which fixes the amount of the credit is the *levy of the tax.*

Id. at 1151. It relied on this conclusion to uphold the district court's jury instruction:

> In this respect, the jury instruction given by the district court was correct. The instruction required that there be a firmly established taxable amount owed the foreign government *and determined by it* before the taxpayer would be entitled to a foreign tax credit.

Id. at 1152.

The panel's rule was created out of whole cloth. Not only is this conclusion wrong, it contradicts the principles which are recognized in the very same opinion. Accrual occurs when the amount due is *determinable*. The crux of the court's error is its substitution of the word "determined" for the historically correct term "determinable." The prevailing "all events" test set out in *Anderson* means that the events which can determine liability have occurred. It does not mean, as the majority opinion concludes, that a determination of the amounts has actually been made. Accrual is not dependent on an assessment or levy by the foreign government. As stated in the dissent at 1153 (citations omitted):

> The charge given by the trial court required the jury to find that the tax had accrued only if the foreign government (1) was aware of the taxable income; (2) had computed the tax due; and (3) the defendant had failed to contest or had acquiesced in the amount of the tax due. This standard is incorrect. The tax on which the credit is based accrues regardless of these conditions. *See Texas Co. v. Commissioner*, 9 T.C. 78, 83 (1947).

> The accepted test of accrual that applies generally as well as in the foreign tax credit context is the "all events" test espoused by the Court in *Anderson*. *See* Rev. Rule 61-93, 1961-1 C.B. 390. Accrual occurs for purposes of the foreign tax credit when the foreign tax liability becomes fixed and determinable. This is not necessarily the same as when the tax is levied, as the majority would hold. Accrual is not dependent upon a formal assessment by the taxing government. A tax liability accrues at the close of the taxing period, when the taxing authority can readily determine the amount of the liability. That the precise amount of income, and therefore tax liability, is not known at the close of the period is irrelevant. It is enough that the amount of the tax is reasonably determinable.

The majority's conclusion conflicts with decisions of this Court and other federal courts. Those decisions show not only that the majority reached the wrong result, but also illustrate the problems which this conflicting rule creates. *United States v. Anderson*, 269 U.S. 422, 46 S.Ct. 131 (1926), the progenitor of the "all events" test, involved accrual of a tax liability. The tax there related to profits made in 1916 but the tax was neither *assessed* nor paid until 1917. The rule in the present case compels a conclusion that the tax accrued in 1917. But this Court held that it accrued in 1916:

> Only a word need be said with reference to the contention that the tax upon munitions manufactured and sold in 1916 did not accrue until 1917. In a technical legal sense it may be argued that a tax does not accrue until it has

> been assessed and becomes due; but it is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it. In this respect, for purposes of accounting and of ascertaining true income for a given accounting period, the munitions tax here in question did not stand on any different footing than other accrued expenses appearing on appellee's books. In the economic and bookkeeping sense with which the statute and Treasury decision were concerned, the taxes had accrued [in 1916].

269 U.S. at 440-441, 46 S.Ct. at 134.

The practical problem which develops by reason of this conflict is serious. Which rule does a corporation in the same position now follow? If it seeks to accrue a tax liability for profits made in 1983 but neither assessed nor paid until 1984, does it follow the rule of *Anderson* and accrue the liability in 1983, or the rule in this case and accrue the liability in 1984?[3] Ambiguity on such a critically important point causes substantial confusion as to the proper application of accrual accounting, a basic concept in many areas of tax liability. This result cannot be tolerated.

United States v. Oklahoma Natural Gas Co., 285 F.2d 333 (10th Cir. 1960), illustrates the same conflict. Under Oklahoma law, the taxpayer was required to pay state taxes on all personal property owned on

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[3]*Anderson* and the other cases cited cannot be distinguished on the ground the ground that they are civil tax cases and this is a criminal tax case. The same substantive rules apply to both. If,

January 1, 1954. However, the taxes were not due and payable until November 1, 1954. The taxpayer's tax year ran from September 1, 1953 to August 31, 1954. The court held that the taxes were properly accrued in the tax year, even though they were not actually determined and paid until the next tax year:

> While the tax did not become due and payable until after expiration of the tax year, all of the facts giving rise to the liability for the tax occurred during the tax year, and although the exact amount of the tax was not known with mathematical certainty, it was fairly susceptible of estimate with reasonable accuracy. It is clear that for purposes of taxation of net income on the accrual basis, the tax was deductible from gross income for the year beginning September 1, 1953 and terminating August 31, 1954.

285 F.2d at 335. Again, the lower court's decision in the instant case would demand a different result—the tax would accrue only in the tax year commencing September 1, 1954. Because of our uniform treatment of taxes throughout this country, the same tax law must apply regardless of the circuit resolving the question.

In *Dravo Corp. v. United States*, 348 F.2d 542 (Ct.Cl. 1965), at issue was the taxpayer's capital stock tax for 1953. The taxpayer filed its return and paid the

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(Footnote 3 Continued)

because of the foreign tax credit, ALVERO owed no tax on the civil side, he cannot be guilty of evasion on the criminal side. *Willingham v. United States*, 289 F.2d 283 (5th Cir. 1961); *Koontz v. United States*, 277 F.2d 53 (5th Cir. 1960).

tax in 1954. The return was reevaluated by the state in 1956 and as a result the taxpayer paid additional tax for the 1953 year in 1956. It argued that the additional tax *assessed in 1956* accrued in 1953, since its tax liability arose in that year. The court agreed:

> [W]e hold that the additional capital stock tax paid by plaintiff in 1956 with respect to the year 1953 accrued in 1953.

348 F.2d at 545-46. Again, the decision here would compel a contrary result—the aditional taxes assessed and paid in 1956 would not have accrued until 1956, the year in which the state determined the amount of tax owed.

The cases discussed above did not involve the concept of accrual as applied to a foreign tax credit. They sought to determine when various taxes accrued and could therefore be claimed as deductions. The legal principles of accrual discussed therein, however, apply equally to determinations of when foreign taxes accrue for the purposes of the foreign tax credit.[4] As stated in Rev.Rule 61-93, 1961-1 C.B. 390:

> The accrual of foreign taxes, for the purpose of the foreign tax credit under section 901 of the 1954 Code . . . must conform to the general rules laid down under section 461 of the 1954 Code . . . which state, in effect, that deductions

[4]The rules governing credits, particularly the foreign tax credit, are broader than those involving deductions and must be applied in the manner most favorable to the taxpayer, as illustrated by the fact that this is one of the very few areas where both cash and accrual basis taxpayers can claim the benefit. *See* Rev.Rule 58-55, 1958 C.B. 266.

> and credits shall be taken for the taxable year which is the proper taxable year under the method of accounting used in computing income.
>
> * * *
>
> From the foregoing, it is apparent that, for the purposes of the foreign tax credit, foreign income taxes are considered as accrued in the taxable year in which the taxpayer's liability for such foreign taxes becomes fixed and determinable. Generally such accrual occurs in the United States taxable year within which the taxpayer's foreign taxable year ends.

Elmhirst v. Duggan, 14 F.Supp. 782 (S.D.N.Y. 1936), involved the issue of when foreign taxes accrue for the purpose of the credit. It arose in a civil context analogous to the criminal context before this Court. In *Elmhirst*, the taxpayer, a resident of England, received dividends from British corporations in 1924. However, she filed no British tax return with respect to those dividends and paid no British tax on them. In 1926, the British government informed her that she was required to report those dividends and pay a $121,124.85 tax on them. The return was filed and the tax paid in 1927. The taxpayer then claimed a foreign tax credit against her 1927 United States tax, arguing that her British taxes accrued in that year. The government argued that the British tax accrued in 1924, the year in which she received the income on which the foreign tax was due, even though the taxpayer filed no British return in that year. The court agreed:

> It follows that the British tax assessed against the plaintiff and paid by her in 1927 had accrued,

> **within the meaning of our Revenue Act, in the year 1924 and was deductible only from her gross income of that year.**

14 F.Supp. at 783.

The position of the government and the court in *Elmhirst* is directly contrary to the Eleventh Circuit's conclusion here. In *Elmhirst*, the foreign government was not aware of the dividend income in 1924. It did not compute the tax on foreign income in 1924. The taxpayer was not aware of the tax, and therefore neither acquiesced nor failed to contest it, until 1926. Yet the government argued and the court agreed that the tax accrued in 1924, the year the taxpayer's liability to pay it became fixed. The decision in the present case, however, *requires* the conclusion that the tax did not accrue until 1926, the year in which the foreign government learned of the income and levied the tax on it.

Elmhirst does not stand alone. In *Russell-Miller Milling Co. v. Helvering*, 69 F.2d 392 (D.C. Cir. 1934), the taxpayer filed no British returns for 1925 and 1926. The British government learned of the taxpayer's failure in 1927 and assessed taxes on it. The matter was resolved in 1928 when the taxpayer paid the British tax. It then claimed a foreign tax credit on its 1928-1929 return, claiming that the British tax accrued in that year. Again, the government argued, and the court agreed, that the tax accrued in the year the taxpayer's obligation to pay the tax arose, not in the year when the foreign government became aware of the taxpayer's obligation, assessed taxes against it, or the year in which the taxpayer acquiesced in the tax by payment. The court stated at 394:

> The case therefore, as we get it, is one in which a foreign tax appears to have been assessed against an American corporation on profits earned in 1925-26. It was assessed as to amount on an arbitrary basis because of petitioner's failure to furnish the statement on which it could be correctly determined. . . . In these circumstances the amount paid accrued in the year the profits on which payment was based were made and not in the year of payment, and the Commissioner was therefore right in assessing the deficiency.

In *Hygienic Products Co. v. Comm'r*, 37 B.T.A. 202, *aff'd*, 111 F.2d 331 (6th Cir. 1940), the taxpayer filed no Canadian tax returns for 1930-1933 because it did not believe it was subject to Canadian taxes. In 1933, Canada required it to file returns for those years. The returns were filed in 1933 and 1934 and the tax was paid in 1934. The taxpayer then claimed a foreign tax credit in 1934, arguing that the Canadian taxes for 1930-1933 accrued in that year. Relying on *Anderson*, *supra*, and *Russell-Miller Milling Co.*, *supra*, the tax court rejected that argument at 207:[5]

> Under the accrual method of accounting, items must be accrued when all events have occurred which show that there is an actual indebtedness to or from the one keeping his books on such basis. (citation omitted). Taxes stand upon the same footing. *United States v. Anderson*, *supra*.

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[5]The Sixth Circuit summarily approved this holding. "There is no merit to this contention [that accrual did not occur until 1934]. 111 F.2d at 332.

> If all the events have occurred "which fix the amount of the tax and determine the liability of the taxpayer to pay it" it must be accrued. (citations omitted).
>
> * * *
>
> The amount of the tax and petitioner's liability for the payment thereof were fixed by the laws of the Dominion of Canada. The amounts could have been ascertained by petitioner and accrued upon its books at the end of each of the years. If proper accrual had been made the amount would have been deductible, at petitioner's election, under section 23 of the revenue act or a credit against its taxes could have been claimed in its returns of income under section 131. But the fact that no deduction was taken and no credit was claimed does not authorize deduction in the taxable year [1934].

Following the district court's instructions and the majority's conclusion in the case under review, the taxpayer's foreign tax in *Russell-Miller* would have accrued in 1927, when the foreign government "computed the tax due" or in 1928, when the taxpayer apparently acquiesced and paid the tax. Yet the government and court both agreed that the tax accrued in 1925 when the taxpayer's liability to pay the tax arose. Similarly, the foreign tax in *Hygienic Products* would have accrued in 1933, when the taxpayer filed his foreign returns for 1930 through 1933, or in 1934, when the taxes due were computed. Yet the government and the court both agreed

that each year's tax accrued in the year the taxpayer's liability to pay that tax arose, i.e., the 1930 tax accrued in 1930, the 1931 tax accrued in 1931, etc. In each case, the opinion here would lead to a contrary result.[6]

Stated in the simplest of terms, the foreign tax cannot be deemed to accrue in one year if the taxpayer lives in Florida, and in another year if the taxpayer resides in New York, the District of Columbia, or the Sixth Circuit. Nor can the year of accrual depend on whether the taxpayer is involved in a civil tax case or a criminal tax case. This Court is the only judicial body capable of resolving this apparent impasse.[7]

The majority opinion below completely ignores these conflicts and makes no attempt to resolve them. Instead, it created a new concept of accrual solely

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[6]ALVERO CRUZ paid the Dominican Republic taxes in 1980. If he claimed that he owed no 1980 United States taxes because of the foreign tax credit, he would be no different from the taxpaerys in *Elmhirst* and *Russell-Miller*, whose identical claims were rejected because the tax accrued in the earlier years. No doubt, the government would assert this position in any subsequent litigation. This illustrates the conflict between the decision below and *Elmhirst* and *Russell-Miller*.

[7]Strict application of the lower court holding would require whole-scale reversals of many convictions under 26 U.S.C. §7203 (willful failure to file returns) for accrual basis taxpayers. Proof of an essential element—tax due and owing—could not be established until the government assessed and levied the tax. Additionally, that same approach would mean that ALVERO is not guilty of the charged crimes for the reason that no United States deficiency accrued inasmuch as no proof was offered that a tax had been levied and assessed.

because it thought ALVERO CRUZ's defense, although correct under these cited authorities, should not be allowed to succeed:

> If we accept Cruz's interpretation of section 905, an accused taxpayer will always avoid successful prosecution. For example, under Cruz's interpretation, a taxpayer in his position could wait and pay no tax, either to the United States or the Dominican Republic until the United States authorities became aware of an irregularity in his tax return. Once discovered, he could either pay or immediately admit the foreign tax and claim the retroactive United States tax credit under section 6511(d)(3), as an absolute defense. Thus, he could fix the amount of the foreign tax liability which would automatically entitle him to the foreign tax credit. If the fraudulent omission is overlooked, both the United States and the Dominican Republic are cheated of taxes. In short, the taxpayer is able to gamble that neither government will become aware of his tax liability.

698 F.2d at 1151-1152. The majority's tortured concept of "accrual" arose from its concern that a taxpayer like ALVERO CRUZ might escape criminal liability. The same concern motivated the court in *United States v. Campbell*, 351 F.2d 336 (2d Cir. 1965), the decision on which the majority relied. The dissenting opinion in this case sets forth the reasons why the majority's concern and *Campbell's* conclusion are wrong and should not control:

The majority premises its decision on *United States v. Campbell*, 351 F.2d 336 (2d Cir. 1965), in which the Second Circuit held that a taxpayer accused of tax evasion could not assert a foreign tax credit as a defense because he did not claim the credit promptly. At the time of the *Campbell* decision, there was a substantial body of law holding that a foreign tax credit had to be claimed promptly or else it was lost. Under 26 U.S.C. §6511(d)(3)(A) [footnote omitted], however, a taxpayer may now claim the credit at any time within ten years of the date he files his return, even if he chose not to take the credit initially. *See Hart v. United States*, 585 F.2d 1025 (Ct.Cl.1978) (en banc). Thus, one prong of *Campbell* is no longer applicable.

The majority is understandably concerned, as was the *Campbell* court, that a taxpayer might claim a foreign tax credit without ever paying the foreign tax, or that he might avoid tax liability by not reporting the income to either country until the IRS detects the omission. That concern, however, is misplaced in this case, as it was in *Campbell*. Despite the majority's protestations, a taxpayer who avails himself of the "intricate technicalities" of the tax law will not go undetected or unpunished. If the foreign tax is not paid for which the credit is claimed, the IRS can redetermine the taxpayer's United States tax for the year in question. If the foreign country's statute of limitations runs, thus extinguishing the taxpayer's liability for the foreign tax, that taxpayer becomes liable for tax evasion under

> 26 U.S.C. §7601 [sic] if he fails to make the proper adjustments to his United States returns for the years in question. Where the foreign statute of limitations has not yet run, as appellant claims here, a tax evasion case is not timely. A taxpayer in appellant's position might be indicted under 26 U.S.C. §7206 for filing a false return if he fails to report the foreign income and the foreign tax credit. *In my opinion, the government indicted appellant for the wrong crime at the wrong time* [emphasis added]. Appellant should have been charged with a violation of §7206, not §7201 [citations omitted].
>
> If the Internal Revenue Code bars the availability of a tax evasion prosecution in this situation, then our hands are tied. Congress is the appropriate body to change the law. We cannot effectuate such a change by allowing an improper gloss to be attached to the meaning of "accrual."

698 F.2d at 1153-1154. Taxpayers like ALVERO CRUZ would not escape all criminal liability; the majority simply imposes "the wrong crime at the wrong time."

In determining the propriety of certiorari review, this Court must be mindful of the additional problem created by the majority opinion: the effective elimination of the foreign tax credit's utility through the creation of grave ambiguities as to its application. This credit holds an important place in our tax laws. Given today's economic dependence on foreign trade and commerce, it is of vital concern to United States businessmen and corporations. The tax credit is not, of course, a recent development:

> Since 1918, double international taxation of U.S. citizens, residents, and domestic corporations has been eliminated by the statutory grants of a tax credit for the income taxes paid to foreign countries on income originating in those countries.
>
> * * *
>
> The statutory foreign tax credit is the principal device by which the United States unilaterally reduces double taxation of its citizens, residents, and domestic corporations.

Gauer, "The Concept of Our Independent Treaty Foreign Tax Credit", 38 Tax L.Rev. 1-4 (1982); *see* Revenue Act of 1918, ch.18, §§222(a)(1)(b)(c) and 238, 40 Stat. 1057, 1073-1074, 1080-1081.

A primary purpose of the foreign tax credit is to *coordinate* United States tax law with foreign tax law. Such coordination demands that a taxpayer is entitled to a credit for *accrued* foreign taxes if those taxes *accrued* pursuant to the law of the foreign country. Rev.Rule 58-55, 1958 C.B. 266 explains the underlying philosophy of the foreign tax credit, concluding that the legislative intent was that the tax should "relate back" to the taxable year to which the foreign tax relates. Also, as recognized in Rev.Rul. 54-14, 1954 C.B. 129, the only appropriate limitations on the foreign tax credit are those expressly provided in the statute. As stated by Gauer, *supra*, the United States through ratification and continued negotiations of bilateral tax treaties, has taken great pains to coordinate the recognition of competing tax rules by the use of foreign tax credits. Where the rules for accrual of taxes are

the same in both the United States and the foreign nation, as in this case, they must be strictly observed without reference to any need for other rules.

The requirement of coordination was not addressed by the appellate court. The trial proof was uncontradicted that Dominican Republic tax laws treated the accrual of ALVERO CRUZ's tax liability in the same manner as *prevailing* United States law.[8] Yet, by attempting to impose additional requirements not intended by the Congress and not found in any judicial decisions on this issue, the opinion virtually destroys the policy of coordinated tax treatment among sovereigns, and places the courts in the awkward position of legislating tax law.

The concern with coordination was evidenced in the analogous Tax Court case of *The Texas Co. (South America), Ltd.*, 9 T.C. 78 (1947), involving the availability of the foreign tax credit to an American corporation doing business in Brazil. The company took no action with respect to the foreign tax in the years 1938, 1940 and 1941. In 1942, after receiving an order from the Brazilian government, the corporation paid the tax. At issue was whether the Brazilian tax accrued annually (as ALVERO CRUZ proved in this case) or in the year it was assessed and paid (as the majority concluded here). Although the taxpayer did not accrue the taxes in its own records nor pay them until 1942, the court

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[8]The panel recognized ALVERO's proof of foreign tax liability. 698 F.2d at 1152. ALVERO's uncontradicted expert testimony was that he was a Domincan resident and citizen, that his substantial tax liability to the Dominican Republic had accrued during the years in question, that the foreign statute of limitations had not expired, and that his tax liability for those years was final.

held that because Brazilian law imposed the tax on an annual basis, the tax accrued in these respective years: "When all events have occurred which control any tax deduction, the same is allowable even though the books may be silent on the deduction." 9 T.C. at 83. ALVERO CRUZ's situation is indistinguishable; Dominican law applies (which was the same as United States law); the tax accrued; the credit is available; ALVERO CRUZ's deficiency is essentially eliminated; there is no crime of income tax evasion.

Given this approach, the only way to effectuate the philosophy of the foreign tax credit and prevent double taxation is to coordinate the tax accrual years—the taxpayer is entitled to a credit for accrued foreign taxes for the same tax year those taxes accrued under the law of the foreign country. The opinion below is to the contrary. It denies ALVERO CRUZ, a citizen of the Dominican Republic, the foreign tax credit even though his taxes accrued under Dominican Republic law. The opinion thus conflicts with clear expressions of legislative intent and prior court decisions concerning this subject.

The creation of this anomaly renders the foreign tax credit provision unworkable and subverts the clear legislative intent which had been consistently affirmed by all courts which have considered the issue. The Eleventh Circuit opinion also improperly limits foreign tax credits, a tax provision which was specifically reserved to Congress. Unlike other provisions of the tax code, which give broad authority to the Commissioner of the Internal Revenue Service for interpretation and implementation, the application of the foreign tax credit is reserved only to Congress, as recognized by IRS regulation. Rev.Rul. 54-14, 1954 C.B. 129 (foreign tax

credit "limited in application only as expressly provided"). Given the absence of "a clearly expressed legislative intention to the contrary", the plain language of the statute and its accompanying regulations controls its construction. *Bread Political Action Comm. v. Federal Elections Comm.*, 455 U.S. 577, 102 S.Ct. 1235, 1238 (1982). The Eleventh Circuit's attempt to reach a new construction of the foreign tax credit is an erroneous method of reviewing tax matters in a criminal case. Here, as in *United States v. Garber*, 607 F.2d 92, 100 (5th Cir. 1979) (en banc), a "criminal proceeding pursuant to section 7201 is an inappropriate vehicle for pioneering interpretations of tax law."

In view of the legal, economic, and practical importance of this issue, this matter is appropriate for resolution by this Court.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 14 day of July 1983 to the Solicitor General, Department of Justice, Washington, D.C.; and to Linda Collins Hertz, Assistant United States Attorney, 155 S. Miami Avenue, Miami, Florida, 33130-1693.

By: BENEDICT P. KUEHNE
BENEDICT P. KUEHNE

Appendix

UNITED STATES of America,
Plaintiff-Appellee,

v.

Jose Medardo Alvero CRUZ,
Defendant-Appellant.

No. 81-5371.

United States Court of Appeals
Eleventh Circuit.

Feb. 22, 1983.

Defendant was convicted before the United States District Court for the Southern District of Florida, Sidney M. Aronovitz, J., of tax evasion, and he appealed. The Court of Appeals, Hatchett, Circuit Judge, held that defendant could not use after trial payment of foreign tax liability to overturn conviction absent proof indicating that he fixed amount of such liability prior to trial.

Affirmed.

Kravitch, Circuit Judge, dissented and filed opinion.

Appeal from the United States District Court for the Southern District of Florida.

Before KRAVITCH, HATCHETT and CLARK, Circuit Judges.

HATCHETT, Circuit Judge:

In this criminal case, with prosecution under 26 U.S.C.A. §7201, we must decide whether a jury instruction regarding establishment of a foreign tax credit under 26 U.S.C.A. §901 was correct. Finding the instruction correct, we affirm.

In May, 1979, a grand jury investigation focused on the appellant, Jose Medardo Alvero Cruz, because information provided by a reliable government source indicated that Cruz was involved with narcotics and tax fraud activities. The investigation led to inquiries in Spain where information showed that Cruz lived a lavish lifestyle and maintained large bank accounts. In order to verify this information, the government addressed Letters Rogatory and a Request for Judicial Assistance to the Spanish authorities through the State Department. These letters requested the Spanish authorities to assist in obtaining the original records of Cruz's bank accounts in Spain. The government also sought records of Spanish merchants from whom Cruz and his wife had purchased merchandise or services and public records concerning ownership of a condominium in Madrid.

The first set of Letters Rogatory and Requests for Judicial Assistance yielded defective evidence and a second set was required. The first set, however, did yield sufficient information to provide a basis on which Cruz was indicted on four counts of tax evasion under 26 U.S.C.A. §7201. The indictment alleged that Cruz had tax deficiencies for the years 1975, 1976, 1977, and 1978.

Before the second set of Letters Rogatory were presented to the Spanish authorities, a hearing was held in the district court. Over the objection of Cruz, the district court granted the government's request for the presentation of the Letters Rogatory and Requests for Judicial Assistance, but with changes. One change required the government to attach a copy of the income tax evasion indictment. Upon request of the Letters Rogatory and Request for Judicial Assistance, the Spanish authorities complied. Provided with this information, consisting mostly of the bank account statements, the government's prosecution followed.

During a pre-trial conference, Cruz objected to the use of all evidence obtained trhough the Letters Rogatory and Requests for Judicial Assistance. The district court again overruled the objections, but admonished the government that such evidence would be subject to "a rigid test of scrutiny" to insure that it was properly obtained. In addition to the Spanish bank accounts, the government also sought to utilize the testimony of an informant who allegedly knew of Cruz's source of income for the year 1975. Cruz, upon learning of this testimony and its possible marijuana crime implications, stipulated that the government's income figures for the 1975 tax year were correct. As a result of the stipulation, the informant did not testify.

During the trial, the government sought to prove tax fraud through the "net worth method." Cruz's defense, based on 26 U.S.C.A. §901 of the Internal Revenue Code, attacked the tax deficiency assessed by the Internal Revenue Service. Cruz contended that no tax deficiency existed because as a citizen of the Dominican Republic, a country which taxes income earned worldwide, his

tax liability to it had accrued. Cruz asserted this defense in spite of the fact that he had filed no Dominican tax return for the years in question, and had not paid the tax at the time of trial. Because this tax liability had accrued to the Dominican Republic under 26 U.S.C.A. §905, and the Dominican Republic's statute of limitations had not expired for collecting the tax, he asserted that the availability of this foreign tax credit would mitigate any tax liability owed to the United States.

At the close of the trial, the district court gave the following jury instruction on the issue of the foreign tax credit:

> For a foreign tax credit to accrue under United States tax laws you must find that with regard to the foreign tax all events have occurred which fix the amount of the tax and determine the liability of the taxpayer to pay it. That is, you must find that the foreign government is aware of the income that is taxable in their country; that the foreign government has computed the tax due on that income, and that the Defendant has acquiesced to or failed to contest that amount of tax due to the foreign government.

Cruz objected to the instruction.

The jury found Cruz guilty on all four counts of tax evasion. He was sentenced to four years of imprisonment on Count I, and two years of imprisonment on each of Counts II, III, and IV, to run consecutively. After trial, Cruz made partial payment to the Dominican Republic taxing authorities.

Cruz offers a number of arguments which are of an evidentiary nature and which we find without merit. On the primary issue, Cruz argues that the district court erred in its instruction to the jury because it misdefined "accrued." We do not agree.

Before an accused can be convicted of tax fraud in violation of 26 U.S.C.A. §7201, the government must prove three elements: (1) a tax deficiency, (2) an affirmative act, and (3) willfulness. *Sansone v. United States*, 380 U.S. 343, 351, 85 S.Ct. 1004, 1010, 13 L.Ed.2d 882 (1965); *United States v. Dwoskin*, 644 F.2d 418, 419 (5th Cir.1981). Because section 7201 defines a criminal offense, the government must prove each element beyond a reasonable doubt. *Dwoskin*, 644 F.2d at 419. In this case, Cruz sought to strike at the very heart of the government's tax fraud case. Instead of concentrating on the willfulness element, as is usually the situation, Cruz attacked the tax deficiency utilizing sections 33(a) and 901(b) of the Internal Revenue Code.

Section 33(a) provides: "The amount of taxes imposed by foreign countries and possessions of the United States shall be allowed as a credit to the extent provided in section 901." Section 901(b)(3) provides: "In the case of an alien resident of the United States and in the case of an alien individual who is a bona fide resident of Puerto Rico during the entire taxable year, the amount of any such taxes paid or accrued during the taxable year to any foreign country . . . ." In this instance, it is undisputed that Cruz, a Dominican Republic citizen, is a resident alien in the United States. He argues that therefore he is entitled to take a foreign tax credit against taxes imposed by the United States.

Section 905(a) provides when a foreign tax credit may be taken and allows the taxpayer the option of electing between the cash or accrual method of reporting. *See United States v. Campbell*, 351 F.2d 336, 338 (2d Cir.1965); 2 R. von T. Rhoades & M.J. Langer, Income Taxation of Foreign Related Transactions, 5.03[4][a]. Cruz, a cash basis taxpayer, elected to accrue his foreign tax credit. The right to take the foreign tax credit is open for ten years. 26 U.S.C.A. §6511(d)(3); *Hart v. United States*, 585 F.2d 1025 (Ct.Cl.1978)(en banc). Cruz contends that since he elected the accrual method of reporting, he is entitled to the credit at any time within the ten year statute of limitations. The problematic aspect of this case is in determining whether Cruz is entitled to a credit for a Dominican Republic tax which has not been reported, determined, paid, or contested.

The Supreme Court established the general rule relating to the accrual of income, deductions, or credits for income purposes, in *United States v. Anderson*, 269 U.S. 422, 46 S.Ct. 131, 70 L.Ed. 347 (1926); and *Dixie Pine Products Co. v. Commissioner of Internal Revenue*, 320 U.S. 516, 64 S.Ct. 364, 88 L.Ed. 270 (1944). That rule provides that a tax is deemed to accrue when all events have occurred which fix the amount of the taxpayer's income, deductions, or credit, and determines the liability of the taxpayer for tax, although there has not yet been an assessment or maturity. *Anderson*, 269 U.S. at 441, 46 S.Ct. at 134; *Dixie Pine Products Co.*, 320 U.S. at 519, 64 S.Ct. at 365. The accrual of the foreign tax credit is essentially governed by this rule. 2 R. von T. Rhoades & M.J. Langer, Income Taxation of Foreign Related Transactions, §5.03[5].

In the case of the foreign tax credit, the final event which fixes the amount of the credit is the levy of the tax. *Campbell*, 351 F.2d at 338; *Cuba Railroad Co. v. United States*, 124 F.Supp. 182 (S.D.N.Y.1954), 135 F.Supp. 847 (S.D.N.Y.1955), *aff'd* 254 F.2d 280 (2d Cir.1958), *cert. denied*, 358 U.S. 840, 79 S.Ct. 64, 3 L.Ed.2d 75 (1958); *see Russell-Miller Milling Co. v. Helvering*, 69 F.2d 392, 393 (D.C.Cir.1934). In the event the taxpayer decides to contest the foreign government's assessment, the taxpayer must claim the foreign tax liability as a credit against the United States tax in the year in which the liability has been finally determined. *Cuba Railroad Co.*, 124 F.Supp. 182. Once the liability becomes fixed, after the dispute has been resolved, the accrued foreign tax liability "relates back" to the year in which it was levied. Revenue Ruling 58-55, 1958-1 C.B. 266; *see Campbell*, 351 F.2d at 338. In the instant case, Cruz did not contest his tax liability to the Dominican Republic. He took no action relating to the Dominican Republic tax (before trial).

In construing the requirements of section 905, we will not be constrained by intricate technicalities which would create a haven for federal tax evasion. When interpreting statutes, we are required to give a practical interpretation which will not produce an absurd result. *State of Alabama ex rel. Graddick v. Tennessee Valley Authority*, 636 F.2d 1061, 1066 (5th Cir.1981). If we accept Cruz's interpretation of section 905, an accused taxpayer will always avoid successful prosecution. For example, under Cruz's interpretation, a taxpayer in his position could wait and pay no tax, either to the United States or the Dominican Republic until the United States authorities became aware of an irregularity in his tax return. Once discovered, he could either pay or

immediately admit the foreign tax and claim the retroactive United States tax credit under section 6511(d)(3), as an absolute defense. Thus, he could fix the amount of the foreign tax liability which would automatically entitle him to the foreign tax credit. If the fraudulent omission is overlooked, both the United States and the Dominican Republic are cheated of taxes. In short, the taxpayer is able to gamble that neither government will become aware of his tax liability. Additionally, if the United States waits for the ten years allowed by statute for the taxpayer to fix the amount of the foreign tax liability, then the six-year statute of limitations on the section 7201 prosecution lapses. Against this background, we must approach this case from a practical viewpoint.

As in *Campbell*, the determination of criminal liability is the real issue at stake, not merely the question of Cruz's right, as in a civil case, to a foreign tax credit. 351 F.2d at 340. Since this is a criminal matter, the government need only establish that Cruz received unreported income, and that his nondisclosure resulted in a tax deficiency. 351 F.2d at 338. The record reveals that the government provided these elements. At this point, Cruz had the burden of negating the deficiency by showing that it was either wrongly computed, cancelled by another deduction or, in this instance, a credit not yet allowed. Cruz sought to prove that the deficiency was negated by showing a credit not yet allowed.

Cruz presented, primarily by expert testimony, four items of evidence as proof of his right to a foreign tax credit: (1) that he was a resident of the Dominican Republic, (2) that he had determined his Dominican tax liability, (3) that the Dominican Republic's statute of

limitations had not expired for the collection of taxes, and (4) that his Dominican Republic tax liability for the respective years were final. No proof, however, was offered which indicated that Cruz fixed the amount of his foreign tax liability prior to trial. Only after the discovery of the deficiency and trial did Cruz fix the amount of his foreign tax liability. His after trial payment of the foreign tax liability cannot be used on appeal to overturn the conviction.[1] *United States v. McCormick*, 67 F.2d 867, 870 (2d Cir.1933), *cert. denied*, 291 U.S. 662, 54 S.Ct. 438, 79 L.Ed. 1054 (1934). In this respect, the jury instruction given by the district court was correct. The instruction required that there be a firmly established taxable amount owed the foreign government and determined by it before the taxpayer would be entitled to a foreign tax credit. The practical effect of this decision means the tax evader can no longer play one government against the other to defeat an evasion prosecution.[2]

We realize the implications of this holding. It now means that when the government begins a section 7201 prosecution of a taxpayer who claims a foreign tax credit under section 905, the government accelerates the time within which the taxpayer may exercise the right to fix the amount of the foreign tax liability and

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[1]We note that as to 1975, the jury could have found that all income for that year came from sources within the United States. With such a finding, no foreign tax credit would be available.

[2]Mindful of the fact that the foreign tax credit is intended to avoid double taxation, we refuse to allow this credit to become a "loophole" that prevents any tax, or prevents prosecution for evasion.

claim the foreign tax credit.[3] We also realize, however, that we are bound to give reasonable interpretations to statutes which are consistent with the intent of Congress. *State of Alabama ex rel. Graddick v. Tennessee Valley Authority*, 636 F.2d 1061 (5th Cir.1981).

CONCLUSION

We therefore hold that the jury instruction given by the district court was correct. We affirm.

AFFIRMED.

KRAVITCH, Circuit Judge, dissenting:

Because I believe the trial judge improperly instructed the jury as to the definition of "accrual" for purposes of the foreign tax credit, I dissent.

Appellant's defense rested on his attempt to demonstrate that no tax deficiency existed in this case because, as a citizen of the Domincan Republic, he was entitled to a foreign tax credit. The presence of a tax deficiency is an essential element of tax evasion.[1] Appellant argued that even though he failed to report the income in question in either the United States or the Dominican Republic, the Dominican Republic tax liability entitled appellant to a credit against his United States taxes.

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[3]The government accelerates the statute of limitations ten year period under section 6511(d)(3).

[1]The other two elements of tax evasion under 26 U.S.C. §7201 are an affirmative act constituting evasion and willfulness. Appellant does not dispute the presence of these two elements.

Therefore, appellant argues, no tax deficiency existed because there was no United States tax due and owing.

As the majority notes, the trial judge first instructed the jury that for a foreign tax credit to accrue "all events [must] have occurred which fix the amount of the tax and determine the liability of the taxpayer to pay it." This instruction was entirely in accord with decades of tax law following the Supreme Court's decision in *United States v. Anderson*, 269 U.S. 422, 46 S.Ct. 131, 70 L.Ed. 347 (1926). By adding an additional gloss to the accepted definition of "accrual," however, the trial judge confused the jury, and thus committed reversible error.

The charge as given by the trial court required the jury to find that the tax had accrued only if the foreign government (1) was aware of the taxable income; (2) had computed the tax due; and (3) the defendant had failed to contest or had acquiesced in the amount of the tax due. This standard is incorrect. The tax on which the credit is based accrues regardless of these conditions. *See Texas Co. v. Commissioner*, 9 T.C. 78, 83 (1947).

The accepted test of accrual that applies generally as well as in the foreign tax credit context is the "all events" test espoused by the Court in *Anderson*.[2] *See*

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[2]The Supreme Court stated the test as follows:

> In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and become due; but it is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it.

(Footnote continued on next page)

Rev.Rul. 61-93, 1961-1 C.B. 390.[3] Accrual occurs for purposes of the foreign tax credit when the foreign tax liability becomes fixed and determinable. This is not necessarily the same as when the tax is levied, as the majority would hold. Accrual is not dependent upon a formal assessment by the taxing government. A tax liability accrues at the close of the taxing period, when the taxing authority can readily determine the amount of the liability. That the precise amount of income, and therefore tax liability, is not known at the close of the period is irrelevant. It is enough that the amount of the tax is reasonably determinable.

The majority premises its decision on *United States v. Campbell*, 351 F.2d 336 (2d Cir.1965), in which the Second Circuit held that a taxpayer accused of tax evasion could not assert a foreign tax credit as a defense because he did not claim the credit promptly. At the time of the *Campbell* decision, there was a substantial body of law holding that a foreign tax credit had to be

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(Footnote 2 Continued)

United States v. Anderson, 269 U.S. 422, 441, 46 S.Ct. 131, 134, 70 L.Ed. 347, 351 (1926).

[3]In the Ruling the Service states:

> [I]t is apparent that, for the purpose of the foreign tax credit, foreign income taxes are considered as accrued in the taxable year in which the taxpayer's liability for such foreign taxes becomes fixed and determinable. Generally such accrual occurs in the United States taxable year within which the taxpayer's foreign taxable year ends.

Rev.Rul. 61-93, 1961-1 C.B. 390, 391.

claimed promptly or else it was lost. Under 26 U.S.C. §6511(d)(3)(A),[4] however, a taxpayer may now claim the credit at any time within ten years of the date he files his return, even if he chose not to take the credit initially. *See Hart v. United States*, 585 F.2d 1025 (Ct.Cl.1978) (en banc). Thus, one prong of *Campbell* is no longer applicable.

The majority is understandably concerned, as was the *Campbell* court, that a taxpayer might claim a foreign tax credit without ever paying the foreign tax, or that he might avoid tax liability by not reporting the income to either country until the IRS detects the omission. That concern, however, is misplaced in this case, as it was in *Campbell*. Despite the majority's protestations, a taxpayer who avails himself of the "intricate technicalities" of the tax law will not go undetected or unpunished. If the foreign tax is not paid for which the credit is claimed, the IRS can redetermine the taxpayer's United States tax for the year in question. If the foreign country's statute of limitations runs, thus extinguishing the taxpayer's liability for the foreign tax, that taxpayer becomes liable for tax evasion under 26 U.S.C. §7601 [sic] if he fails to make the proper

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[4] 26 U.S.C. §6511(d)(3)(A) provides:

> If the claim for credit or refund relates to an overpayment attributable to any taxes paid or accrued to any foreign country or to any possession of the United States for which credit allowed against the tax imposed by subtitle A in accordance with the provisions of section 901 or the provisions of any treaty to which the United States is a party, in lieu of the 3-year period of limitation prescribed in subsection (a), the period shall be 10 years from the date prescribed by law for filing the return for the year with respect to which the claim is made.

adjustments to his United States returns for the years in question. Where the foreign statute of limitations has not yet run, as appellant claims here, a tax evasion case is not timely. A taxpayer in appellant's position might be indicted under 26 U.S.C. §7206 for filing a false return if he fails to report the foreign income and the foreign tax credit. In my opinion, the government indicted appellant for the wrong crime at the wrong time. Appellant should have been charged with a violation of 7206, not 7201. *See United States v. Taylor*, 574 F.2d 232 (5th Cir.1978) (taxpayer violates 7206 if he willfully files a false return with the knowledge that the return is not true and correct as to every material matter, if no taxes are in fact due).

If the Internal Revenue Code bars the availability of a tax evasion prosecution in this situation, then our hands are tied. Congress, however, is the appropriate body to change the law. We cannot effectuate such a change by allowing an improper gloss to be attached to the meaning of "accrual."

Appellant is entitled to an appropriate jury charge on his defense denying the existence of a tax deficiency. Because the instruction denied him that right, I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5371

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOSE MEDARDO ALVERO CRUZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion FEBRUARY 22, 11 Cir., 1983, 698 F.2d 1148).

(April 15, 1983)

Before KRAVITCH, HATCHETT and CLARK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT.

/s/ JOSEPH W. HATCHETT
United States Circuit Judge

Office-Supreme Court, U.S.
FILED
OCT 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-64

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOSE MEDARDO ALVERO CRUZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the district court's instruction to the jury as to the accrual of a foreign tax for purposes of the foreign tax credit.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 698 F.2d 1148.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1983. A petition for rehearing was denied on April 15, 1983 (Pet. App. 15). On June 10, 1983, Justice Powell extended the time within which to file a petition for a writ of certiorari to and including July 15, 1983. The petition was filed on July 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on four counts of willfully attempting to evade federal income taxes for 1975 through 1978, in violation of

Section 7201 of the Internal Revenue Code.[1] Petitioner was sentenced to four years' imprisonment on count one and two years' imprisonment on each of the other counts, the terms to be served consecutively (Pet. App. 4). The court of appeals affirmed, one judge dissenting (Pet. App. 1-14).

The evidence at trial showed that petitioner substantially understated his income for 1975-1978. Petitioner reported taxable income in 1975 of $14,025 (Tr. 25). Using the net worth method, the government established that petitioner's true income for that year, based on cash deposits in two Spanish banks, was at least $2,806,596 (Tr. 25, 51). Petitioner reported taxable income for 1976-1978 in the amounts of $59,890, $90,816 and $106,889 respectively (Tr. 26-27). The government established that petitioner's true income for those years, based on interest earned on the Spanish bank accounts, was at least $215,986, $322,820 and $354,527 respectively (Tr. 26-27).

Petitioner did not seriously contest the government's income figures,[2] nor did he dispute that he had willfully committed affirmative acts constituting tax evasion (Pet. App. 5). His sole defense was that the government had failed to prove a "tax deficiency" for any of the years in question, proof of which is requisite to conviction under Section 7201. *Sansone* v. *United States*, 380 U.S. 343, 351 (1965). Petitioner's defense was based on the Code's foreign tax credit provisions. I.R.C. §§ 901-905. He introduced evidence that during 1975-1978 he was a resident or citizen

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[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended ("the Code" or "I.R.C.").

[2]Petitioner stipulated as to the correctness of the government's figure for 1975 in order to preempt the testimony of an informant, who would have testified that the likely source of petitioner's unreported income was narcotics trafficking (Pet. App. 3).

of the Dominican Republic, which taxes its residents on their worldwide income (Pet. App. 3). He asserted that his tax liability to the Dominican Republic had "accrued" at the end of each year; that he was entitled to a U.S. foreign tax credit on account of each such accrued liability; and that the credit for each year wiped out the deficiency in U.S. tax that would otherwise have been attributable to his unreported income. Pet. App. 3-4.

Petitioner conceded that, as of the date of trial, he had never filed tax returns with the Dominican Republic, that he had never been assessed Dominican Republic taxes, and that he had never made any tax payments to that country (Tr. 651-652). Although the Dominican Republic maintains a registry of taxpayers, petitioner's name apparently does not appear in it (Tr. 815). Neither petitioner's original U.S. tax returns, nor his amended returns filed in 1981 (Exh. 11-13), claimed a credit for taxes paid or accrued to the Dominican Republic or to any other country. Petitioner produced no books or records at trial reflecting his accrual of such taxes, and his witness conceded that he had not complied with the Treasury Regulations governing assertion of foreign tax credit claims (Tr. 942, 955-957). After his trial, petitioner filed tax returns with the Dominican Republic and made partial payment to it of the taxes assertedly due (Pet. App. 4).

The district court instructed the jury as follows (Pet. App. 4) concerning petitioner's foreign tax credit defense:

> For a foreign tax credit to accrue under United States tax laws you must find that with regard to the foreign tax all events have occurred which fix the amount of the tax and determine the liability of the taxpayer to pay it. That is, you must find that the foreign government is aware of the income that is taxable in their country; that the foreign government has computed

> the tax due on that income[;] and that the Defendant has acquiesced to or failed to contest that amount of tax due to the foreign government.

Petitioner objected to this instruction (Pet. App. 4). The court of appeals held that the instruction was correct (*id.* at 9).

ARGUMENT

Petitioner contends that the conditions for accrual set forth in the second sentence of the trial court's instruction are inconsistent with established principles of tax accounting. Petitioner failed, however, to lay a proper evidentiary foundation for his claim to a foreign tax credit and accordingly was entitled to no instruction on the subject; any error in the instruction actually given was thus harmless. In any event, the instruction correctly stated the law applicable to the facts of this case.

1.a. A trial court need not instruct on a defense theory for which there is no evidentiary foundation. *Battle* v. *United States*, 209 U.S. 36, 38 (1908); *Bird* v. *United States*, 187 U.S. 118, 132 (1902). In order to establish a defense based on the foreign tax credit, petitioner was required to demonstrate that he was entitled to the credits at the times he filed his 1975-1978 tax returns; eligibility arising at a later date would not eliminate criminal liability for offenses already consummated. See, *e.g.*, *United States* v. *Keltner*, 675 F.2d 602, 604 (4th Cir. 1982), cert. denied, No. 81-2223 (Oct. 4, 1982); *Willingham* v. *United States*, 289 F.2d 283, 288 (5th Cir.), cert. denied, 368 U.S. 828 (1961).

The Code sets forth strict requirements governing claims to and allowance of foreign tax credits. Section 905(a) provides that a taxpayer, regardless of his usual method of accounting, may elect to take a foreign tax credit "in the year in which the taxes of the foreign country * * * accrued, subject, however, to the conditions prescribed in subsection

(c) * * *." Section 905(c) provides, in the case of a foreign tax accrued but not paid, that the taxpayer's giving of a surety bond may be required "as a condition precedent" to allowance of the credit. Section 905(b) provides that a credit will be allowed "only if the taxpayer establishes to the satisfaction of the Secretary" the "total amount" of his foreign income, "the tax paid or accrued" on that income, and "all other information necessary for the verification and computation" of the credit.

These verification requirements are elaborated in the Treasury Regulations. They require a taxpayer claiming a credit for unpaid foreign taxes to file a copy of "the return on which each such accrued tax was based." Treas. Reg. § 1.905-2(a)(2). If the foreign tax return is unavailable, the taxpayer must submit "[a] certified statement of the amount claimed to have accrued," together with a computation of the foreign tax; "[e]xcerpts from the taxpayer's accounts showing amounts of foreign income and tax thereon accrued on its books"; a bond, "if deemed necessary by the district director"; and, in case a bond is not required, "a specific agreement wherein the taxpayer shall recognize its liability to report the correct amount of tax when ascertained * * *." Treas. Reg. § 1.905-2(b)(2).

Petitioner plainly failed to comply with these regulatory requirements for allowance of foreign tax credits at the time his offenses were committed. He had never filed a tax return with the Dominican Republic and his name did not appear in its registry of taxpayers (Tr. 651-652, 815; Pet. App. 4). He did not report any foreign income, nor claim any credit for foreign taxes, on his original or amended U.S. tax returns. He presented no records reflecting accrual of taxes to the Dominican Republic and gave no surety bond. Far from submitting an agreement "recogniz[ing his] liability to report the correct amount of tax," petitioner was actively seeking to evade the taxes of both the United States and the

Dominican Republic. Indeed, petitioner claimed the foreign tax credits in question for the first time, orally, before the district court in this case. Because petitioner failed to comply with the Code and Regulations, he was not entitled to any foreign tax credits when he filed his 1975-1978 returns and, accordingly, was not entitled to any instruction concerning a foreign tax credit defense.[3]

b. The conclusion that an individual may not assert a foreign tax credit defense to a Section 7201 tax evasion prosecution, where he has concealed the income in question both from the United States and from the other taxing nation, is supported by the only other court of appeals decision that has considered the question. In *United States* v. *Campbell*, 351 F.2d 336 (2d Cir. 1965), cert. denied, 383 U.S. 907 (1966), the defendant, like petitioner here, had made a "belated attempt to advance a credit theory" at his tax evasion trial, yet had produced "no proof of payment, accrual or offer of payment." 351 F.2d at 340. The court held that he "was not entitled to the foreign tax credit since he failed to make full and timely disclosure of his [foreign] income"; rather, "by concealment and playing one country against the other, he sought to avoid any taxation whatsoever" of his gains. 351 F.2d at 339, 340. The defendant's theory, the court noted, would permit people to evade taxes with impunity if they were fortunate enough to own a residence abroad: they could try to "cheat both countries of any tax," then retroactively assert the foreign tax credit "as

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[3]As the court of appeals noted (Pet. App. 9 n.1), there was an additional lack of proof of a foreign tax credit defense as to petitioner's 1975 taxable year. The credit is available only if a taxpayer has income from sources outside the United States. I.R.C. § 904(a). Petitioner, however, offered no proof whatever on the source of his income for 1975. As noted above (see p. 2 n.2, *supra*), the government originally sought to prove that the likely source of petitioner's income was drug trafficking; in view of petitioner's stipulation, however, the government did not present this evidence.

an absolute defense" once they sensed the IRS on their trail. 351 F.2d at 338, 341.[4] The court concluded that "[i]t would be anomalous to allow criminal responsibility under United States law for an otherwise consummated crime to depend absolutely on the subsequent and possibly fortuitous imposition of tax liability under foreign law." 351 F.2d at 339.[5]

2. In any event, assuming that petitioner was entitled to an instruction concerning the foreign tax credit, the trial court's instruction was proper. It reasonably interpreted established principles of tax accounting as applied to the facts of this criminal case.

It is well settled that the time for accruing a tax liability is governed by the "all events" test, first articulated by this Court in *United States* v. *Anderson*, 269 U.S. 422, 441 (1926). Under that test, a liability accrues when "all the

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[4]Indeed, as noted below (Pet. App. 8), petitioner's theory could make a Section 7201 prosecution impossible in such circumstances. The statute of limitations for prosecuting tax evasion is six years. I.R.C. § 6531(2). Yet the courts have generally held that a taxpayer has ten years from the date his return is filed to elect the foreign tax credit. *E.g.*, *Hart* v. *United States*, 585 F.2d 1025 (Ct. Cl. 1978). See I.R.C. § 6511(d)(3). Assuming that the foreign country's statute of limitations has not run, therefore, a dual-resident taxpayer on petitioner's theory could *always* assert the foreign tax credit as an automatic defense to a tax evasion charge.

[5]Petitioner (Pet. 23-25), joined by the Tax Section of the Florida Bar as *amicus curiae* (Amicus Br. 15), suggests that the *Campbell* court's reasoning "is no longer applicable." As the dissent below noted (Pet. App. 12-13), when *Campbell* was decided there existed "a substantial body of law holding that a foreign tax credit had to be claimed promptly or else it was lost," whereas the courts have recently interpreted Section 6511(d)(3) to give taxpayers a ten-year period within which to make the claim. See n. 4, *supra*. But while the *Campbell* court did observe that the defendant had "failed to enter a timely claim for the credit," it relied chiefly on the separate ground that he had "failed to make full and timely disclosure of his [foreign] income." 351 F.2d at 339. This latter basis for the court's decision is unaffected by recent developments concerning Section 6511(d)(3).

events have occurred which determine the fact of the liability and the amount thereof can be determined with reasonable accuracy." Treas. Reg. § 1.461-1(a)(2). The accrual of foreign taxes is governed by the same rule, so that, "for the purpose of the foreign tax credit, foreign income taxes are considered as accrued in the taxable year in which the taxpayer's liability for such foreign taxes becomes fixed and determinable." Rev. Rul. 61-93, 1961-1 C.B. 390, 392.

It is likewise settled that the "all events" test must be given a pragmatic construction. In *Flamingo Resort, Inc.* v. *United States*, 664 F.2d 1387, 1389 (9th Cir.), cert. denied *sub nom. Hilton Hotels Corp.* v. *United States*, No. 82-404 (Nov. 29, 1982), it was held that courts should "avoid[] a rigid definition of the term 'fixed' [liability] in order to be responsive to unique facts and practical considerations." In *Travis* v. *Commissioner*, 406 F.2d 987, 990 (6th Cir. 1969), the court applied the "all events" test by viewing the transaction as a whole " 'in the light of realism and practicality.' " And as early as *Barker* v. *Magruder*, 95 F.2d 122, 125 (D.C. Cir. 1938), it was held that a liability is to be accrued when, given "the course of dealings between the [parties]," there was "in the circumstances then confronting the taxpayer a reasonable anticipation [that the liability] would be paid."

At the times he filed his 1975-1978 returns, petitioner's tax liability to the Dominican Republic was not "fixed," and hence had not "accrued," under these well-established principles of tax accounting. At those times, petitioner had not reported any income to, or filed any tax returns with, the Dominican Republic. Such unreported income as has been discovered was evidenced by cash deposits and interest thereon in Spanish banks; Dominican tax authorities were unaware of this income and could not have been expected, in the normal course, to learn of it. There was no suggestion at the time of his offenses that petitioner intended ever to report his income to the Dominican Republic; indeed, he

was actively seeking to evade the taxes both of the United States and of that country.[6] Viewing petitioner's "course of dealings" with the Dominican Republic " 'in the light of realism and practicality,' " it is clear that his tax liability to it, far from being "fixed," was utterly speculative and theoretical.[7]

Contrary to the contentions of *amicus curiae*, therefore, the court of appeals did not sanction a " 'redefinition' of the term 'accrual' " (Amicus Br.3) when it approved the jury instruction at issue. The trial judge correctly determined that, where the circumstances reveal criminal tax evasion, more is required for accrual of a foreign tax under the "all events" test than that "the foreign income be earned in the taxable year in question" (Amicus Br. 9). The conditions set forth in the trial court's instruction — that the foreign

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[6]It is well established that the "all events" test requires a taxpayer to postpone accrual of a foreign tax so long as he contests his liability therefor. *Dixie Pine Co.* v. *Commissioner*, 320 U.S. 516, 519 (1944); *Cuba R.R.* v. *United States*, 124 F.Supp. 182 (S.D. N.Y. 1954); Rev. Rul. 58-55, 1958-1 C.B. 266. Petitioner's tax liability to the Dominican Republic was even more speculative than if he had acknowledged, but formally contested, it. Whereas there is usually a reasonable possibility that a taxpayer will lose a contest, there was no likelihood at all that petitioner would ever pay the Dominican tax, except upon the fortuitous occurrence of his getting caught by the I.R.S.

[7]None of the cases cited by petitioner (Pet. 18-22, 27-28) or *amicus curiae* (Amicus Br. 13) stands for the proposition that a tax may be accrued in circumstances suggesting that it will never be paid. In *Elmhirst* v. *Duggan*, 14 F. Supp. 782 (S.D. N.Y. 1936); *Russell-Miller Milling Co.* v. *Helvering*, 69 F.2d 392 (D.C. Cir. 1934); *Hygienic Products Co.* v. *Commissioner*, 37 B.T.A. 202 (1938), aff'd, 111 F.2d 330 (6th Cir. 1940); and *Texas Co.* v. *Commissioner*, 9 T.C. 78 (1947), intent to evade taxes was not a factor, and the income in question was earned in (and hence was more easily discoverable by) the foreign taxing jurisdiction. Thus, the taxpayer's liability did not depend on the remote contingency, present here, that the foreign government would somehow discover income earned outside its borders by a person actively seeking to evade its tax.

government must be aware of the income and have computed a tax, and that the taxpayer must have acquiesced in or failed to contest its assertion — represent a reasonable interpretation of the "all events" test as applied to the facts of this criminal case. That instruction does not warrant review by this Court.[8]

3. Finally, contrary to the contentions of petitioner (Pet. 26-28) and *amicus curiae* (Amicus Br. 7-8, 16, 19-20), the decision below is consistent with the policy of "preventing double taxation." The court of appeals held only that petitioner's tax liability to the Dominican Republic had not "accrued," for the purpose of establishing a defense to charges of tax evasion for 1975-1978, at the times petitioner filed his returns for those years. But this is not to say that petitioner, for civil tax purposes, will be unable to claim a credit for Dominican taxes when and if they do "accrue." Indeed, the Service has ruled that a taxpayer forced to postpone accrual of a foreign tax because he contests liability is entitled to claim a credit once the contest is resolved, and that the credit will then "relate back" to the earlier year. Rev. Rul. 58-55, 1958-1 C.B. 267. The court of appeals recognized this principle (Pet. App. 7), and nothing in its

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[8]The question presented here as to the construction of the "all events" test is analogous to that presented in *Flamingo Resort, Inc.*, on which this Court recently denied certiorari. The issue there was whether a casino was required to accrue gambling IOUs in income, even though the IOUs were legally unenforceable under state law. 664 F.2d at 1388. The Ninth Circuit held that the "speculative and potential legal objections" available to the casino's debtors were not dispositive for "all events" purposes, noting that the debtors almost invariably paid up and that, practically speaking, the liabilities represented by the IOUs were "as 'fixed' as it is possible to be." *Id.* at 1390. Here, conversely, while petitioner may have had a "speculative and potential" tax liability to the Dominican Republic at the time of his offenses, his liability, practically speaking, was nil, since there was no reasonable likelihood that he would discharge it.

opinion suggests that the principle would not apply here. The decision below thus poses no threat of double taxation. And the policy of preventing double taxation, as the court of appeals properly observed (Pet. App. 9 n.2), most surely does not require that the foreign tax credit function as "a 'loophole' that prevents * * * prosecution for evasion."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOSE MEDARDO ALVERO CRUZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF *AMICUS CURIAE*, TAX SECTION OF THE FLORIDA BAR, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Question Presented for Review

Whether the Eleventh Circuit's new definition of accrual of tax liability which imposes additional requirements beyond the recognized principles of accrual accounting conflicts with pronouncements of this Court and other federal courts, and redefines the concept of accrual for income tax and other purposes in a manner having implications far beyond this case?

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The Eleventh Circuit's new definition of the term "accrual" conflicts with the definition of that term set forth in the Regulations of the Treasury Department, in decisions of this Court, as well as in decisions of circuit courts and lower federal courts. If left undisturbed, such definition will undermine the purpose behind the foreign tax credit and destroy the uniformity necessary for the effectuation and application of the tax laws	4
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NO. 83-64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOSE MEDARDO ALVERO CRUZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF *AMICUS CURIAE*, TAX SECTION OF THE FLORIDA BAR, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Statement of Interest of *Amicus Curiae*, Tax Section of the Florida Bar

The Florida Bar is a non-profit association organized under the laws of the State of Florida and composed of members in good standing of the Bar of the State of Florida. The Florida Bar is dedicated to the inculcation in its members of the principles of duty and service to the public, the improvement of the administration of justice,

and the advancement of the science of jurisprudence. Among its many activities is the analysis of legislation and judicial decisions that affect its members and the society they serve.

The Tax Section of The Florida Bar is charged with the responsibility of focusing upon issues of state and federal tax law. In connection with such responsibility, the Tax Section analyzes existing and proposed tax legislation and judicial decisions construing the tax laws. Through its Tax Section, The Florida Bar provides a forum for debate and for the interchange of ideas on issues of relevance to its members and to society.

The Tax Section of The Florida Bar is vitally concerned with judicial construction of the tax laws such that the intent of the subject law is effectuated. The Tax Section of The Florida Bar is also concerned with the uniform construction and application of the tax laws. Finally, The Tax Section of The Florida Bar is concerned that precedent be followed in the application of the tax laws such that the goals of uniform construction and equal treatment can be attained.

Accordingly, The Tax Section of The Florida Bar has a vital interest in seeking review of the decision of the Eleventh Circut Court of Appeals, which if left undisturbed would authorize, in the Eleventh Circuit, a heretofore unrecognized definition of the word "accrual" which is in conflict with the legislative intent behind the foreign tax credit of the Internal Revenue Code as well as with the definition of the word "accrual" as set forth in the regulations of the Treasury Department, by this Court, and followed by circuit courts and lower federal courts. The definition of the word "accrual", as set forth by the Eleventh Circuit, frustrates the intent of Congress and undermines the uniform application of the tax laws.

Consent to the filing of this *amicus curiae* brief has been granted by both petitioner and respondent.

Summary of Argument

Succinctly stated, this case raises the issue of a court's power to subvert the intent and plain language of a tax statute by "redefining" its terms in a manner which is inconsistent with the legislative definition and with a long-settled judicial definition.

Although this case arises out of an allegedly erroneous jury instruction in a criminal tax prosecution dealing with the application of the foreign tax credit, the decision of the Eleventh Circuit, and its "redefinition" of the term "accrual", will have serious and far reaching ramifications outside of the area of criminal tax law and outside of the area of the application of the foreign tax credit.

The Eleventh Circuit's decision defining the word "accrual" squarely conflicts with the definition of that term set forth in the regulations of the Treasury Department, decisions of this Court, decisions of federal circuit courts and decisions of many lower federal courts. In addition, the decision of the Eleventh Circuit undermines the purpose behind, and the effect of, the foreign tax credit—the prevention of double taxation. By defining "accrual" of a foreign tax, for purposes of the foreign tax credit, as occurring upon levy and assessment, the United States may now tax foreign-derived income even though a foreign tax on that income has "accrued." It is unclear whether or not the Eleventh Circuit's definition is limited to the context of a foreign tax credit in a criminal prosecution for tax evasion, or whether that definition applies generally. It is unthinkable that the term "accrual" can have a different meaning in different contexts. If it did, a taxpayer could be criminally liable for an activity to which no civil liability attaches. In addition, if the Eleventh Circuit's decision is allowed to stand, taxpayers in that

Circuit will labor under a rule which is an anomaly. These taxpayers will receive treatment different from taxpayers in other areas of the country under a federal law which is necessarily uniform. This will cause large-scale problems of basic business accounting.

The decision of the Eleventh Circuit violates precedent, is inconsistent with the clear meaning of federal regulations, undermines the policy behind the foreign tax credit, as well as the application of federal laws which should be uniform. As such, the Eleventh Circuit's decision below has implications far beyond the confines of the case.

ARGUMENT

The Eleventh Circuit's new definition of the term "accrual" conflicts with the definition of that term set forth in the Regulations of the Treasury Department, in decisions of this Court, as well as in decisions of circuit courts and lower federal courts. If left undisturbed, such definition will undermine the purpose behind the foreign tax credit and destroy the uniformity necessary for the effectuation and application of the tax laws.

The settled definition of the word "accrual" recognizes that "accrual" takes place when all of the events have occurred which are necessary to determine the fact of liability and which fix with reasonable certainty the amount of such liability. It has long been the settled law as to both foreign and domestic tax credits, as well as to deductions, that "accrual" may occur in advance of levy and assessment. In *United States* v. *Cruz*, 698 F. 2d 1148, at 1151 (11th Cir. 1983), the Eleventh Circuit altered this definition by holding that a foreign tax does not "accrue" until the foreign government levies upon the taxpayer.

Section 33(a) and Section 901(b)(3) of the Internal Revenue Code provide that taxes due to the United States may be offset by any foreign tax for which the taxpayer is liable, regardless of whether or not the foreign tax has been paid. 26 U.S.C. §33(a); 26 U.S.C. §901(b)(3). Section 901(b)(3) of the Internal Revenue Code defines the amount of the foreign tax credit as "the amount of any such taxes paid or accrued during the taxable year to any foreign couuntry". 26 U.S.C. §901(b)(3). Section 905(a) of the Internal Revenue Code allows the taxpayer to take the foreign tax credit in the year in which the foreign tax "accrues". 26 U.S.C. §905(a). Section 905(c) of the Internal Revenue Code permits the redetermination of the taxpayer's United States tax liability if the amount of the foreign tax paid differs from the amount claimed as a credit by the taxpayer as an accrued foreign tax liability. 26 U.S.C. §905(c).

Because resident aliens are taxed by the United States on income earned worldwide, they are exposed to international double taxation if their foreign income is also taxed by the country from which it is derived. To alleviate this problem, 26 U.S.C. §901 authorizes an elective credit for foreign income taxes. Rev. Rul. 58-55, 1958-1 C.B. 266; B. Bitker, 3 *Federal Taxation of Income, Estates and Gifts,* at ¶69.1.1. The theory behind the foreign tax credit was summarized by the Internal Revenue Service in Rev. Rul. 58-55, 1958-1 C.B. 266, at 267:

> The basic purpose of the allowance of a foreign tax credit is to provide a credit against United States income on specific income from foreign sources for foreign taxes paid on such income and in this manner to substantially avoid double taxation on the income when earned. See H.R. Report No. 767, 65th Congress, Second Session, C.B. 1939-1 (Part 2), 86, at page 93. The alternative pro-

> visions of section 905(a) of the 1954 Code allowing a credit for foreign taxes when the tax accrued, irrespective of the accounting method used, demonstrate the special nature of such credit. The purpose of this provision of the Code was to allow a taxpayer, employing the cash method of accounting, to take the credit in the year in which the foreign tax accrued and thus offset the foreign tax against United States Federal income tax due. See H.R. Report No. 179, 68th Congress, First Session, C.B. 1939-1 (Part 2), 241, at page 257, and Senate Report No. 398, 68th Congress, First Session, C.B. 1939-1 (Part 2), 266, at page 284.

The Senate Finance Committee explained the rationale as follows:

> [The] foreign tax credit system embodies the principle that the country in which a business activity is conducted (or in which any income is earned) has the first right to tax the income arising from activities of that country, even though the activities are conducted by corporations or individuals resident in other countries. Under this priniciple, the home country of the individual or corporation has a residual right to tax income arising from these activities, but recognizes the obligation to insure that double taxation does not result. Some countries avoid double taxation by exempting foreign source income from tax altogether. For U.S. taxpayers, however, the foreign tax credit system, providing a dollar-for-dollar credit against U.S. tax liability for income taxes paid to a foreign country, is the mechanism by which the double taxation is avoided.

S. Rep. No. 94-938, *reprinted* in 1976-3 C.B. (Vol. 3), at 271.

To accomodate its tax system with that of other countries, the United States has chosen the foreign tax credit as the method of preventing double taxation. See Ad Hoc Committee on Foreign Tax Credit, Section of Taxation, American Bar Association, *Comments Regarding Proposed Foreign Tax Credit Regulations,* 33 Tax Lawyer 35, at 36 (1979). It has been stated that "[a]s our system stands, it is this foreign tax credit device which makes United States trade and investment abroad possible in the twentieth century tax world—a world in which income taxes at high rates are the central theme." S. Surrey, Preface to E. Owens, *The Foreign Tax Credit,* at vii (Harvard Law School 1961), *cited in,* Ad Hoc Committee on Foreign Tax Credit, Section of Taxation, American Bar Association, *Comments Regarding Proposed Foreign Tax Credit Regulations,* 33 Tax Lawyer 35, at 36 (1979). The objective of the credit is to eliminate the imposition of income tax both by another country and by the United States on income from foreign sources. The Internal Revenue Code accomplishes this by "yielding to the foreign taxing jurisdiction, not by exemption of foreign source income, but by a credit of the foreign income tax as long as there is foreign source income". Ad Hoc Committee on Foreign Tax Credit, 33 Tax Lawyer, at 37. This policy "is frustrated to the extent that taxes imposed by a foreign country and the United States under similar tax systems are not offset by a U.S. credit". Ad Hoc Committee on Foreign Tax Credit, 33 Tax Lawyer, at 37.

Although the legislative intent behind the foreign tax credit, as set forth in S. Rep. No. 94-938, quoted above and *reprinted in* 1976-3 C.B. (Vol. 3), at 271, is clear, in its decision below, the Eleventh Circuit has ignored the legislative mandate and has substantially increased the possibility of double taxation even though a foreign tax on that income has previously "accrued".

By altering the definition of the word "accrual", as used in 26 U.S.C. §905(a), the Eleventh Circuit has undermined the policy behind the foreign tax credit by altering the "accomodation" and "coordination" of United States taxes with foreign taxes.

Not only is the decision of the Eleventh Circuit at odds with the policy behind the foreign tax credit, but the decision of the Eleventh Circuit is also squarely in opposition to the accepted definition of the term "accrual".

Although the foreign tax credit sections of the Internal Revenue Code utilize the word "accrual", nowhere do they define that term. Rather, as the Internal Revenue Code implies, and as the Treasury Department has made clear in Rev. Rul. 61-93, 1961-1 C.B. 390, the general definition of "accrual" as used throughout the Internal Revenue Code applies to the "accrual" of foreign taxes:

> The accrual of foreign taxes, for the purpose of the foreign tax credit under section 901 of the 1954 Code . . . must conform to the general rules laid down under section 461 of the 1954 Code . . ..
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> • • •
>
> From the foregoing, it is apparent that, for the purposes of the foreign tax credit, foreign income taxes are considered as accrued in the taxable year in which the taxpayer's liability for such foreign taxes becomes fixed and determinable. Generally such accrual occurs in the United States taxable year within which the taxpayer's foreign taxable year ends.

See also, Rev. Rul. 58-55, 1958-1 C.B. 266, at 267 ("However, the accrual of foreign taxes, for the purpose of the foreign tax credit under section 901 of the 1954 Code . . .

must conform to the general rules laid down under section 461 of the 1954 Code . . ..")

Thus, the definition of the word "accrual" for all purposes, including the foreign tax credit, is that set forth in 26 U.S.C. §461 and amplified in Treas. Reg. §1.461-1 (a)(2). Treas. Reg. §1.461-1(a)(2) states:

> Under an accrual method of accounting, an expense is deductable for the taxable year in which all the events have occurred which determine the fact of the liability and the amount thereof can be determined with reasonable accuracy.

Nowhere in the Internal Revenue Code is "accrual" defined as requiring a formal levy and assessment before "accrual" can occur. Rather, as Treas. Reg §1.461-1(a) (2) makes clear, all that is necessary for "accrual" to take place is that all of the events must have occurred which are necessary to determine the fact of liability, and that the amount of that liability be reasonably determinable. Clearly, all that this requires is that the foreign income be earned in the taxable year in question. It is at this time that the liability arises and the amount of that liability can be determined with reasonable accuracy. The foreign tax liability thus "accrues" at the close of the taxable year in which the foreign income is earned, notwithstanding the fact that no levy or assessment has been made by the foreign taxing authority.

It is apparent from the Internal Revenue Code, Treas. Reg. §1.461-1(a)(2), Rev. Rul. 61-93, 1961-1 C.B. 390, and Rev. Rul. 58-55, 1958-1 C.B. 266, that the definition of "accrual" is to be uniform in its application, notwithstanding the context in which it is applied. The foregoing view of "accrual" is consistent not only with the statute, regulations and revenue rulings, but with a long line of authority having as its precuser a case decided by this Court in 1926.

In *United States* v. *Anderson*, 269 U.S. 422, 46 S.Ct. 131 (1926), this Court established the rule that a tax "accrues" when all of the events have occurred which are necessary to determine the liability of the taxpayer for the tax, and which are necessary to determine the amount of that liability with reasonable accuracy, even though there has not been an assessment or levy. *Anderson*, 269 U.S. at 441; 46 S.Ct. at 134.

In *Anderson*, the corporate taxpayer was a manufacturer of munitions. In 1916, certain munitions' taxes were imposed by the United States for profits earned by the taxpayer during that year. These taxes were paid in 1917. The taxpayer deducted these tax payments on its return for the year 1917.

The government contended that the deduction for the 1916 taxes should have been taken in 1916, the year in which the liability "accrued". The taxpayer contended that the correct year in which to take the deduction was 1917, the year in which the 1916 tax became due and payable.

The question presented to this Court in *Anderson*, whether or not a tax liability "accrues" upon assessment or at the earlier date when all of the events necessary to fix the fact of liability have occurred, is analagous to that presented by the case under review.

In *Anderson*, this Court's answer was that there need not be a levy and/or assessment in order for a tax liability to "accrue". Rather, "accrual" of a tax liability occurs, according to this Court, in advance of assessment, when all of the events occur which are necessary to determine the taxpayer's liability and to fix the amount of that liability. *Anderson*, 269 U.S. at 441; 46 S.Ct. at 134. The answer of this Court became settled law, applied in innumerable decisions dealing with the accrual of credits, deductions, and income.

The pronouncement of this Court in *Anderson* has been so pervasive that the test set forth in that decision, which has been popularly denominated as the "all events" test, became codified in the now-existing Treasury Regulations. See Treas. Reg. §1.461-1(a)(2), *supra*.

Nonetheless, the "all events" test, as set forth in *Anderson,* as followed by its progeny, and as codified in Treas. Reg. §1.461-1(a)(2), is but a restatement of a time-honored principle of accounting. This time-honored principle, recognized by this Court in *Anderson* and applied in a legion of lower court decisions, is now threatened by the decision of the Eleventh Circuit in the case under review.

Accrual basis accounting is a method of keeping accounts which recognizes income when earned and expenses when incurred regardless of when cash is received or disbursed. Thus, under the accrual system, income is reportable when the right to receive it becomes fixed, not when the income is received. Similarly, deductions are to be taken in the year in which the liability to pay the item becomes fixed even though payment is due in a later year. *See* B. Bitker, 4 *Federal Taxation of Income, Estates and Gifts,* at ¶105.3 (1981). The decision of the Eleventh Circuit undermines the entire basis of accrual accounting by altering the definition of the word "accrual" for certain purposes. Millions of taxpayers who now rely upon the "accrual" system of accounting are certain to be affected if the decision of the Eleventh Circuit is allowed to stand.

The Fifth Circuit (the predecessor of the Eleventh Circuit) has summarized the concept of accrual accounting as follows:

> The theory behind the accrual system is not complicated. Income items are reported in the year in which the right to receive them becomes fixed even

> though such items are not immediately receivable. At no time, however, are such items reportable later than the year of actual receipt. So it is with deductions. Items to be deducted are reported in the year in which the liability to pay such items becomes fixed and the amount is reasonably ascertainable even though the payment is not then due. [citations omitted] For this reason it is recognized that an item should be accrued "when (1) all the events have occurred which fix the amount of the claim and determine the question of liability; (2) the amount is readily ascertainable; and (3) the liability therefore is determined rather than contingent". 2 Mertens, Law of Federal Income Taxation §12.76 at p. 306.

Gillis v. *United States*, 402 F.2d 501, 506 (5th Cir. 1968).

This principle has become so well-accepted that it is reflected in innumerable lower court decisions. *Gillis* v. *Commissioner, supra* (deduction "accrued" in year liability incurred where amount of liability reasonably determinable); *Schuessler* v. *Commissioner*, 230 F.2d 722 (5th Cir. 1956); *Pacific Grape Products* v. *Commissioner*, 219 F.2d 862 (9th Cir. 1955); *Harrold* v. *Commissioner*, 192 F.2d 1002 (4th Cir. 1951); *Guardian Investment Corp.* v. *Phinney*, 253 F.2d 326 (5th Cir. 1958); *Zimmerman Steel Co.* v. *Commissioner*, 130 F.2d 1011 (8th Cir. 1942); *Burlington-Rock Island Railroad Co.* v. *United States*, 321 F.2d 817 (5th Cir. 1963); *Keeby's, Inc.* v. *Paschal*, 188 F.2d 113 (5th Cir. 1951); *Putoma Corp.* v. *Commissioner*, 601 F.2d 734 (5th Cir. 1979).

Likewise, numerous judicial decisions have recognized that tax credits "accrue" in the year in which the tax liability out of which the credit arises becomes fixed and the amount thereof becomes reasonably determinable. *Anderson*, 269 U.S. at 441; 46 S.Ct. at 134; *United States* v. *Okla-*

homa Gas, 285 F.2d 333 (10th Cir. 1960); *Dravo* v. *United States*, 348 F.2d 542 (Ct. Cl. 1965); *Parrott Estate Co.* v. *McLaughlin*, 89 F.2d 188 (9th Cir. 1937); *Continental Baking Corp.* v. *Helvering*, 77 F.2d 119 (D.C. Cir. 1935); *Simon* v. *Commissioner*, 231 F.2d 639 (6th Cir. 1956); *Cecil* v. *Commissioner*, 100 F.2d 896 (4th Cir. 1939).

The same rule of "accruability" applies to the foreign tax credit as well. Rev. Rul. 61-93, 1961-1 C.B. 390; *Elmhirst* v. *Duggan*, 14 F.Supp. 782 (S.D.N.Y. 1936); *Russell-Miller Milling Co.* v. *Helvering*, 69 F.2d 392 (D.C. Cir. 1934); *Hygienic Products Co.* v. *Commissioner*, 37 B.T.A. 202, *aff'd.* 111 F.2d 331 (6th Cir. 1940); *Texas Co.* v. *Commissioner*, 9 T.C. 78 (1947). In each of these cases, the taxpayer was allowed to claim the foreign tax credit because the foreign tax had "accrued", despite the fact that the foreign government had not yet levied on the taxpayer. These holdings are consistent with the settled definition of "accrual".

Further support for the argument that Congress intended that the foreign tax credit be taken in the year to which it relates, and not in the year of levy, is found in Rev. Rul. 58-55, 1958-1 C.B. 266, and in the fact that under Section 905(a) of the Internal Revenue Code even a cash-basis taxpayer can claim the foreign tax credit in the year in which it "accrues".

In Rev. Rul. 58-55, 1958-1 C.B. at 267, the Treasury Department ruled that a "foreign tax for the purpose of such credit is accruable for the taxable year to which it relates even though the taxpayer contests the liability therefor *and such tax is not paid until a year later.*" (emphasis added). In Rev. Rul, 58-55, the Treasury Department ruled that the principle of *Dixie Pine Products Co.* v. *Commissioner*, 320 U.S. 516, 64 S.Ct. 364 (1944), that an accrual basis taxpayer could not accrue and deduct a state tax

liability that the taxpayer was contesting, had no application to the "accruability" of the foreign tax credit. See also, Rev. Rul. 77-487, 1977-2 C.B. 479, at 480. Thus, even where the taxpayer is contesting the foreign tax, the foreign tax credit is not postponed until the year in which the contested liability is finally determined, but rather, the credit applies in the year of "accrual".

Similarly, the Internal Revenue Code allows even a cash basis taxpayer to claim the foreign tax credit in the year of "accrual". ("The credits provided in this subpart may, at the option of the taxpayer and irrespective of the method of accounting employed in keeping his books, be taken in the year in which the taxes of the foreign country or the possession of the United States accrued. . . ." 26 U.S.C. §905(a)). As the Treasury Department stated in Rev. Rul. 58-55, 1958-1 C.B. 266, at 267, "[t]he alternative provisions of section 905(a) of the 1954 Code allowing a credit for foreign taxes when the tax accrued, irrespective of the accounting method used, demonstrates the special nature of such credit." Normally, a cash basis taxpayer can claim a credit only in the year in which payment takes place. 26 U.S.C. §461(a); Treas. Reg. §1.461-1(a).

The foregoing principles—that a taxpayer need not postpone its claim of the foreign tax credit, even when it is contesting the foreign tax liability, until the contested liability is finally determined, and that even a cash basis taxpayer can claim the foreign tax credit in the year of "accrual"—indicate not only the special nature of the foreign tax credit, but that it was the intent of Congress that the foreign tax credit be taken in the earliest possible year, the year of "accrual", and that the taxpayer need not await levy or assessment. Clearly, there is absolutely no basis in the Internal Revenue Code, or in the case law, for the Eleventh Circuit's decision.

United States v. *Campbell*, 351 F.2d 336 (2d Cir. 1965), relied upon by the Eleventh Circuit in its decision below, was based on law that is inapplicable today. At the time of *Campbell*, a taxpayer was required to claim the foreign tax credit promptly. See *United States* v. *Cruz*, 695 F.2d at 1153-1154 (Kravitch, J., dissenting). Because the taxpayer had failed to make prompt disclosure of its foreign income, the *Campbell* court held that the credit was not available. Today, 26 U.S.C. §6511(d)(3)(A) expressly gives a taxpayer ten years from the date of filing the return in which to claim the credit. See *Hart* v. *United States*, 585 F.2d 1025 (Ct. Cl. 1978) (en banc); See also Rev. Rul. 77-487, 1977-2 C.B. 479.

Clearly, the concern of the court in *Campbell*, and that of the Eleventh Circuit below, was the taxpayer's use of the foreign tax credit defense to avoid United States tax liability by claiming the foreign tax credit but ultimately never paying the foreign tax. See *Campbell*, 351 F.2d at 340; *Cruz*, 698 F.2d at 1152.

This argument, made by the Court in *Campbell*, and by the Eleventh Circuit below as a justification for altering the definition of "accrual", disregards the intent of the Internal Revenue Code, as well as the clear language of the Treasury Regulations, revenue rulings, and decades of precedent. Although the Eleventh Circuit characterized the taxpayer's actions as utilizing the "intricate technicalities" of the tax code as a haven for tax evasion, *Cruz*, 698 F.2d at 1151, the Internal Revenue Code permits the behavior of this taxpayer. In fact, the Internal Revenue Code contains sophisticated provisions for the contingency that the taxpayer may never pay the foreign tax which was claimed as a credit. If that tax is not paid, the government may redetermine the United States tax due from the taxpayer for the subject year under 26 U.S.C. §905(c).

When the statute of limitations of the foreign country expires, a criminal action under 26 U.S.C. §7201 is available if the taxpayer fails to amend his return accordingly. Prior to the expiration of the foreign statute of limitations, the section 7201 action is not available. If the taxpayer fails to report the foreign income and related tax credit, an action under 26 U.S.C. §7206 for willfully filing a false return may also be available.

Thus, contrary to the contentions of the Eleventh Circuit in *Cruz,* 698 F.2d at 1152, the remedies of the government are not foreclosed by utilizing the accepted definition of "accrual" as applied to the foreign tax credit. *Cruz,* 698 F.2d at 1152. Rather, the Service's traditional remedies, both criminal and civil, remain available. The only effect of these provisions is to delay a tax evasion prosecution until the foreign statute of limitations has expired. Such a result is necessary because there cannot be any evasion of United States tax, to the extent that the United States tax would be offset by an "accrued" foreign tax, until the foreign statute of limitations expires. See *Cruz,* 698 F.2d at 1154 (Kravitch, J., dissenting). This is the clear result and the clear intent of the Internal Revenue Code, because no United States taxes can be due on the foreign income as long as the foreign statute of limitations has not expired. Otherwise, the taxpayer may be subject to "double taxation".

The Treasury Regulations provide the government with additional protection from the defalcating taxpayer. Treas. Reg. §1.905-4 provides that, where a foreign tax has "accrued" but not been paid, the government may require the taxpayer to file a bond as a condition precedent to claiming the credit. In addition, Treas. Reg. §1.905-2(a) requires the taxpayer to file Form 1116 or Form 1118 when claiming the foreign tax credit. If the foreign tax return is available,

Treas. Reg. §1.905-2(a) requires the taxpayer to attach it to its United States tax return if the taxpayer is claiming the credit for an "accrued" but unpaid foreign tax. If the foreign tax return is not available, Treas. Reg. §1.905-2(b) requires the taxpayer to provide other forms of proof of the "accrual" of the foreign tax liability. And, as previously set forth herein, 26 U.S.C. §905(c) and Treas. Reg. §1.905-3 provide for a redetermination of the taxpayer's United States tax liability when the amount of the foreign tax credit claimed proves incorrect.

These administrative provisions, as well as the civil and criminal remedies alluded to, provide the government with adequate safeguards and remedies to prevent the abuse of the foreign tax credit. Given the foregoing, there is no justification for altering the settled definition of the word "accrual" in the name of the assertion of criminal liability.

In its decision below, the Eleventh Circuit has altered the accepted definition of the term "accrual" by grafting on to that definition the additional requirment of a levy. In the Eleventh Circuit, a taxpayer cannot now claim the foreign tax credit until the year in which the foreign government levies the tax on the taxpayer, notwithstanding the fact that, under the settled definition of the word "accrual", the foreign tax liability became fixed in the year that the income was earned.

Beside the fact that the *Cruz* decision undermines the policy behind the foreign tax credit and has no basis in the law, the *Cruz* decision raises other serious issues of great administrative and practical importance.

As previously stated herein, Treas. Reg. §1.461-1(a)(2) sets forth a single, uniform meaning for the term "accrual". In *Cruz*, the Eleventh Circuit has apparently changed the definition of this term as used in the context of the foreign tax credit when raised in a tax evasion

prosecution. Whether or not the Eleventh Circuit's new definition of "accrual" applies in other contexts is not clear from the *Cruz* decision. Nevertheless, it is arguable that the danger exists that the specious reasoning of *Cruz* could be utilized to alter the entire concept of "accrual" accounting as used in the Internal Revenue Code and to render meaningless the provisions of Section 905(c) of the Code which provides for a redetermination of the taxpayer's United States tax liability when the amount of the foreign tax credit claimed proves incorrect. Even if the foregoing is not the case, it is unthinkable that the term "accrual" can have one meaning in the context of the foreign tax credit in a tax evasion prosecution, and a different meaning in all other contexts. Such a result contravenes the clear intent of the Internal Revenue Code, the Treasury Regulations, and the case law construing the Code.

If the application of the Eleventh Circuit's new definition is limited to criminal cases where the foreign tax credit is raised, the results will be anomalous. Theoretically, a taxpayer could be criminally liable yet not be civilly liable for the same transaction. This is so because the Eleventh Circuit's new definition of "accrual" would, in effect, provide an easier standard of proof for the government in a criminal action than in a civil action. Such a concept is contrary to our jurisprudential tradition.

This result is anomalous for an additional reason. Under settled law, a taxpayer cannot be guilty of a criminal tax violation if there is no underlying civil tax violation. *Koontz* v. *United States,* 277 F.2d 53 (5th Cir. 1960); *Willingham* v. *United States,* 289 F.2d 283 (5th Cir. 1961), *cert. denied,* 368 U.S. 828 (1961). And, under the Eleventh Circuit's definition of the word "accrual," as used in the

context of the foreign tax credit, a tax deficiency can be found for criminal purposes even though there is no underlying civil tax deficiency. This is so because under the Eleventh Circuit's decision, the "accrual" of foreign taxes for criminal purposes requires a levy, whereas for civil purposes there is no such requirement.

The rules of accrual accounting and the definition of the term "accrual" are, and must be, uniform. The Eleventh Circuit itself acknowledged that the foreign tax credit is governed by the same rules of "accrual" that govern any other tax credit. *United States* v. *Cruz*, 698 F.2d at 1151 ("The accrual of the foreign tax credit is essentially governed by this rule." [referring to the "all events" test]); See also, Rev. Rul. 61-93, 1961-1 C.B. 390, 391. Unfortunately, the Eleventh Circuit proceeded to create and apply a novel and incorrect rule. *Cruz*, 698 F.2d at 1151.

Notwithstanding the view of the Eleventh Circuit, it is clear that the word "accrual" has, and was intended to have, a uniform meaning throughout the tax law, whether the context be one of a domestic tax credit or a foreign tax credit, a deduction, the computation of income, or whether the action is civil or criminal. See Treas. Reg. 1.461-1(a)(2); Rev. Rul. 61-93 1961-1 C.B. 390.

The decision of the Eleventh Circuit below has altered the settled definition of the word "accrual". This new definition contravenes the implied meaning of 26 U.S.C. §461, the express language of Treas. Reg. §1.461-1(a)(2), as well as the judicial definition of the term "accrual" as set forth by this Court and followed in innumerable cases. The decision of the Eleventh Circuit undermines the policy behind the foreign tax credit and subverts the intended effect of that credit, the prevention of in-

ternational double taxation. By altering the settled definition of the word "accrual", the Eleventh Circuit's action threatens the very core of a system of tax accounting which is relied upon by millions of taxpayers. In addition, the Eleventh Circuit's decision threatens the uniformity necessary for the effectuation and application of the tax laws in a just manner. Finally, the Eleventh Circuit's decision has the anomalous result of holding this taxpayer criminally liable for an action as to which no civil liability attaches. This result necessarily flows from the Eleventh Circuit's decision below which imposes criminal sanctions in a situation where there may be no underlying civil tax deficiency.

CONCLUSION

The decision of the court below conflicts with the clear intent of a federal statute, the clear language of a federal regulation, as well as with decisions of this Court, federal circuit courts, and innumerable lower federal courts. The issue presented is one of great legal and practical importance in the administration of our tax law and should be decided by this Court.

For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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